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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS, PETITIONER

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 85-89) is reported at 173 F. 2d 554. The findings of fact and conclusions of law of the District Court (R. 71-77) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 25, 1949 (R. 89). The petition for a writ of certiorari was filed June 23, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner contracted for the sale and delivery of molasses at a price determined in accordance with information received from a local OPA official who was not, however, a regional administrator or district director. The contract price was not in excess of the ceiling price in effect at the time of the contract. By amendment to Revised Maximum Price Regulation 183, the ceiling applicable to petitioner's sale and delivery of molasses was reduced to a price lower than the contract price. After the effective date of the new maximum price, petitioner made deliveries at the contract price, contrary to the statutory and regulatory prohibitions of deliveries at over ceiling prices. The questions presented are:

1. Whether Section 205(d) of the Emergency Price Control Act of 1942 gave petitioner immunity from liability for violation of the regulatory prohibition of deliveries at over ceiling prices by reason of the fact that the deliveries were made at a price which was valid when the contract was made.

2. Whether, under Section 205(e)(1) of the Act, petitioner's reliance, in determining its contract price, upon information furnished by the local OPA official, barred an action against it to recover damages for later making deliveries at a price in excess of the OPA ceiling established after the contract date.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1941, as amended, 56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U.S.C. App. 901 et seq., provided:

> Sec. 4(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f) or to offer, solicit, attempt, or agree to do any of the foregoing. [50 U.S.C. App. 904(a)].

> Sec. 205(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or

determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action. [50 U.S.C. App. 925(d)].

Sec. 205(e) * * * The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same—

(1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; * * * [50 U.S.C. App. 925(e)].[1]

Section 1 of Revised Maximum Price Regulation 183 (8 F.R. 9532) provided:

Regardless of any contract, agreement, lease, or other obligation or of any price regulation or order heretofore issued by the Office of Price Administration, no person to whom this regulation is applicable shall sell or deliver and no person in the course of trade or business shall buy or receive in the Territory of Puerto Rico any of the commodities set forth

[1] This provision was added by Section 12(b) of the Price Control Extension Act of 1946, 60 Stat. 676.

> in this regulation at a price higher than the maximum prices specified herein; and no person shall offer, solicit or attempt to do any of the foregoing.

Amendment 32 (9 F.R. 4820), effective May 9, 1944, added Section 65 to RMPR 183, which provided in relevant part as follows:

> (b) On or after May 9, 1944, the maximum price for molasses shall be 13.6¢ per gallon delivered at the mill.

Amendment 45 (9 F.R. 9213), effective August 2, 1944, insofar as here relevant, added to the above quoted language of Amendment 32 the phrase, "or at the mill tank."

STATEMENT

Since this case is here for the second time,[2] and since most of the earlier issues have been finally resolved, only a brief summary of the facts relevant to the present issues is deemed necessary.

Petitioner, a refiner of sugar and producer of molasses, entered into a contract on March 3, 1944, for the sale of most of its 1943-1944 season's production of molasses to a single purchaser. The contract price was 17¢ per gallon. Under the contract, title to the molasses passed to the buyer as soon as it was produced and the molasses was to be stored at the buyer's risk in petitioner's tank and withdrawn by the buyer at a later date. Before enter-

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[2] See No. 422, October Term, 1947, certiorari denied, 332 U.S. 837.

ing into the contract, petitioner inquired of the local OPA office as to its ceiling price. It was informed in writing on February 29, 1944, by F. A. Besosa, an employee in the local OPA Food and Beverage Section, that the then current ceiling price was the highest price charged by the seller during the base period April 10 to May 10, 1942 (R. 48). Under the General Maximum Price Regulation which was applicable to molasses at the time, this advice was correct and the contract price of 17¢ per gallon was valid since it did not exceed petitioner's base period price. However, by Amendment 32 to Revised Maximum Price Regulation 183, effective May 9, 1944, the Price Administrator removed molasses from the coverage of the General Maximum Price Regulation and established a new (dollar and cents) ceiling price of 13.6¢ per gallon[3] for that commodity under RMPR 183. (See the Court of Appeals' opinion on the earlier appeal, 163 F. 2d 303, 305-306). Petitioner learned of this amendment on its effective date from a newspaper report but made no inquiry of OPA concerning it (R. 42-44). All withdrawals of molasses by the buyer from petitioner's tank were made thereafter from September 12, 1944, to December 7, 1944 (163 F. 2d at 306).

At the first trial the District Court held that, as to the bulk of the molasses, which was placed in

[3] Amendment 45, effective August 2, 1944, was merely a clarifying amendment which preceded petitioner's deliveries and which, in view of the present issues, has no significance here.

petitioner's tank prior to the effective date of Amendment 32, the sale and delivery had been consummated before the maximum price was lowered, and there was, therefore, no violation in the sale and delivery at the contract price of 17¢ per gallon. As to the balance, the overcharge was 3.4¢ per gallon and judgment was entered in favor of the Government for single damages so found, the court having determined that the violations were not intentional. *Porter* v. *Mercado,* 67 F. Supp. 107.

The Government and petitioner both appealed. The Court of Appeals reversed (*Anderson* v. *Mercado,* 163 F. 2d 303), holding that all the molasses had been delivered after the effective date of Amendment 32 at an over-ceiling price, in violation of RMPR 183. The cause was remanded for the re-assessment of damages equal to the total overcharges plus such further sum, within the statutory limits, as the District Court might deem proper if, upon further consideration, it should find that the violations had been wilful or the result of failure to take practicable precautions. The Court of Appeals considered and rejected the arguments urged here by petitioner. *Anderson* v. *Mercado, supra,* at 310. Certiorari was denied. 332 U. S. 837.

On remand, the District Court found that petitioner had failed to take practicable precautions to avoid the overcharge (R. 77) and judgment was entered in favor of the Government for an amount equal to one and one-half times the total overcharges (R. 78).

Petitioner again appealed, reiterating, *inter alia*, its earlier contentions, which the Court of Appeals again rejected (R. 85-89).

ARGUMENT

Petitioner's contentions, based upon the provisions of subsections 205(d) and 205(e) of the Emergency Price Control Act, were twice rejected by the Court of Appeals. This Court has already denied a petition for a writ of certiorari grounded, *inter alia*, upon the same contentions. The instant petition presents nothing warranting further review.

1. Petitioner's major argument is that Section 205(d) of the Act barred liability on account of sales made pursuant to a valid agreement under the provisions of the Act and that petitioner's deliveries, even though at a price higher than the then effective ceiling price, were made in fulfilment of a contract valid when entered into, thus meeting the conditions and entitling it to the protection of that section. This amounts to an assertion that the Administrator was powerless to make a lower maximum price effective against sellers who had foreseen such contingency and contracted for future deliveries at the price prevailing at the date of the contract. Such a construction of Section 205(d) would have brought that subsection into conflict with Section 4(a) of the Act which made it unlawful, regardless of contract, to sell *or deliver* in vio-

lation of the Administrator's regulations.[4] No Congressional intent to achieve such inconsistency is anywhere evident. Furthermore, petitioner's construction would permit a violator to gain an advantage from Section 205(d), a result which the legislative history of that section indicates the Congress did not intend to bring about. See Rep. 931, 77th Cong., 2d Sess.; *Bowles* v. *Franceschini,* 145 F. 2d 510 (C.A. 1); *Foster & Company* v. *Bowles,* 144 F. 2d 870 (E.C.A.). The clear purpose of Section 205(d), manifested by its grant of immunity of unqualified scope,[5] was to protect against suit for breach of contract a party whose performance of the contract was made illegal by OPA

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[4] Petitioner has misread *Porter* v. *Bledsoe,* 159 F. 2d 495 (C.A. 4), and *Crary* v. *Porter,* 157 F. 2d 410 (C.A. 8), as authorities for the proposition that an agreement entered into after the issuance of a controlling regulation came within Section 205(d), while one entered into prior to the issuance of a regulation did not (Pet. 15-17). These cases made no such distinction. They clearly held that Section 205(d) protected things done in conformity with the Act but gave no immunity for violations thereof. Moreover, the attempted distinction of contracts made under a regulation from those entered into in advance of a regulation is negated by the all inclusive language of Section 4(a) of the Act: "regardless of any contract, * * * heretofore or hereafter entered into * * *."

[5] Compare this with the limited grant of subsection 205(e). The relevant provisions of both subsections were:

"205(d)—No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done * * *."

"205(e)—* * * The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same * * *."

regulation. *Bowles* v. *Rock*, 55 F. Supp. 865, 868 (D. Neb.). Were petitioner's view sound there would have been no need for this safeguard nor, significantly, for the scope of the immunity granted, since the contract would have prevailed over the regulation.

Moreover, we think the Court of Appeals correctly pointed out that the phrase, "agreement thereunder," used in Section 205(d) referred not to private contracts but to pricing agreements with industry groups under Section 5 of the Act. But even if we assume that the section did refer to private agreements, we submit that a contract providing for future delivery at the contract price, even though that price might exceed the OPA ceiling at the delivery date, far from constituting an agreement "under" the provisions of the Act, was violative both of the Act and the regulation. Section 4(a) of the Act and Section 1 of RMPR 183 prohibited deliveries at over-ceiling prices. An agreement to exceed the maximum price at the delivery date was illegal notwithstanding the validity of the contract price at the contract date. The protection of Section 205(d) obviously was not afforded to things done and agreements made in violation of the Act and regulation. *Porter* v. *Bledsoe, Crary* v. *Porter, Bowles* v. *Franceschini, supra.*

2. As a subsidiary argument which petitioner claims is offered to give color to the one discussed above (Pet. 19), and whose relevance is therefore

not clear, petitioner urges that its reliance upon the written advice of the OPA employee, Besosa, was sufficient to bring it within the protection of Section 205(e) of the Act (Pet. 19-22). Petitioner recognizes that Besosa was not one of the officials specified in that section (Pet. 20-21) but seems to argue an equitable estoppel against the Government for holding him out as a person from whom advice could be obtained. The fact is, of course, that this provision of Section 205(e) was added to the Act by the Stabilization Extension Act of 1946, long after Besosa's advice was given. The retroactive effect of this provision was to protect those who had relied upon the advice of the specified OPA officials. Wholly apart from the fact that in these circumstances the claimed estoppel is an obvious non sequitur, reliance upon advice from persons other than those designated for the furnishing of official interpretations creates no estoppel against the Government. *Bowles* v. *Mannie and Company,* 155 F. 2d 129 (C.A. 7); *Schreffler* v. *Bowles,* 153 F. 2d 1 (C.A. 10), certiorari denied, 328 U. S. 870; *Bowles* v. *Indianapolis Glove Company,* 150 F. 2d 597 (C.A. 7), certiorari denied, 326 U. S. 794.

In any event, Besosa's advice was requested and given concerning the then effective OPA maximum price. The advice given was correct and the contract price was valid when agreed upon. Thereafter the maximum price was lowered by Amendment 32 to RMPR 183 which affected future sales and deliveries. As to the new price, petitioner

neither asked for nor received advice from OPA. Thus, the essence of petitioner's argument is that the furnishing by OPA of information as to a current price disabled it from changing that price at any time in the future. This, we submit, is patently erroneous.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOHN R. BENNEY,
ISRAEL CONVISSER,
Attorneys.

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